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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.
No. 453.

RAY H. GARNER, *et al.*,

Petitioners,

vs.

BOARD OF PUBLIC WORKS OF THE CITY OF LOS ANGELES, *et al.*,

Respondents.

AMICUS CURIAE BRIEF OF AMERICAN CIVIL LIBERTIES UNION.
(On Behalf of Petitioners.)

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Prefatory Statement.

The passage of the loyalty order for city employees, City Ordinance No. 94004, by the Council of the City of Los Angeles on October 21, 1948, followed the pattern of action of governmental bodies throughout California and the nation. This widespread manifestation of legislative action has aroused the interest and concern of thinking people everywhere. The ordinance raises many issues, and to the grave doubts as to its wisdom are added even greater doubts as to its legality.

Because of the serious constitutional issues involved, on behalf of the American Civil Liberties Union, Southern California Branch, we desire to present to the Court for

*On behalf of petitioners.

its study and consideration our position as to the validity of loyalty oath requirements in general and as to this ordinance in particular.

For the purposes of the argument, we accept the facts as set forth in the pleadings and recited in the petition for certiorari and briefs heretofore filed in opposition.

It is our considered opinion and position that, fundamental to any resolution of the problems raised by loyalty oaths which are made a condition of public employment is the recognition of the function of the Bill of Rights as the equilibruim between maximum freedom and power for those occupying public office as "government" to properly execute their trust, on the one hand, and the maximum freedom of the individual to exercise his right to unfettered speech, thought and action, on the other.

We feel that the oath in question shows a clear invasion of the individual's freedom without the necessary commensurate showing of its need in the execution of the public trust and that as a result of this lack of balance the oath should be struck down as a violation of the 14th Amendment. As Mr. Justice Jackson said in *Kunz v. New York* (1951), 95 L. Ed., Advance Opinion 241, 244, speaking of another aspect of this same problem:

> "Addressing himself to the subject 'Authority and the Individual' one of the keenest philosophers of our times observes:
>
> "'*The problem, like all those with which we are concerned, is one of balance;* too little liberty brings stagnation, and too much brings chaos." (Emphasis added.)

I.

The Responsibility of Effectuating and Implementing the Policy and Function of Government Implies Not Only the Power but the Obligation to Employ Personnel Whose Qualifications Will Ensure the Proper Discharge of That Responsibility.

We cannot, either in logic or principle, take issue with the position of the respondents that a governmental body, agency or other instrumentality has the right to set up tests and qualifications of various kinds for those who seek service with it. In the sense that it is charged with the duty of selecting those persons best qualified to serve its purposes, there can be no quarrel with the authority of a governmental body, state or federal, to formulate standards applicable to all applicants for public employment. This principle was early established and given judicial sanction in the enforcement of the Civil Service Regulations established by the Congress of the United States. [Title 5 U. S. C. A., Sections 631, *et seq.*, and see 26 Opinions of the Attorney General 363 (1906) and 26 Opinions of the Attorney General 502 (1907). And this principle is equally true on the State level. *Sheehan v. Scott*, 145 Cal. 684, 687 (1905); *Maxwell v. Civil Service Commission*, 169 Cal. 336, 338 (1915).]

And that these standards extend also throughout the term of service was reiterated in *U. S. v. Curtis* (1882 C. C. N. Y.), 12 Fed. 824, where the Court observed:

> "The power to prohibit acts of officers as employees which are incompatible with the proper discharge of their duties, or which impair the efficiency or tend to demoralize the public service, is essential to promote the end and object of Government; and this power resides in the legislative department of the Government."

II.

Notwithstanding Such Obligation, the Government in Establishing Qualifications for Public Employment Is Limited in the Exercise of Its Discretion by Two Clearly Established Principles: (A) The Qualifications Must Bear a Reasonable Relation to the Type of Employment Offered; (B) The State, or an Instrumentality Thereof, Cannot Directly or Indirectly Deprive Any Person of the Rights Guaranteed to Him by the First and Fourteenth Amendments.

This Court has recently affirmed the principle that the Federal Government in establishing limitations and qualifications upon federal public employment is bound by the rule of reasonableness. In *United Public Workers of America v. Mitchell*, 330 U. S. 75, 101 (1946), the Court said:

> "For regulation of employees, it is not necessary that the act regulated be anything more than an act *reasonably* deemed by Congress to interfere with the efficiency of the public service." (Emphasis added.)

The Court also adopted language from *Ex parte Curtis*, 106 U. S. 232, 235 (1882), to support its position in validating certain limited restrictions on political activities of Federal employees to the effect that:

> "The evident purpose of Congress in all this class of enactments has been to promote efficiency and integrity in the discharge of official duties, and to maintain proper discipline in the public service. Clearly, such a purpose is within the just scope of legislative power, and it is not easy to see why the act now under consideration *does not come fairly within the legitimate means* to such an end." (Emphasis added.)

And compare the dissent of Edgerton, J., in *Joint Anti-Fascist Refugee Committee v. Clark*, 177 F. 2d 79, 88 (C. A. D. C. 1949).

That qualifications on employment and tenure at the state level must also bear a reasonable relation to the particular ends sought to be achieved, finds expression in innumerable cases:

Haub v. Tuttle, 80 Cal. App. 561, 251 Pac. 925 (1926);

Sloat v. Board of Examiners of Bd. of Education of City of New York, 274 N. Y. 367, 9 N. E. 2d 12 (1937);

Fink v. Finnegan, 270 N. Y. 356, 1 N. E. 2d 462 (1936);

Brown v. Russell, 166 Mass. 14, 32 L. R. A. 253 (1896);

People ex rel. Lane v. Lindblom, 215 Ill. 58, 74 N. E. 73 (1905).

It follows of necessity that where a public body imposes a qualification for employment to which objection is voiced, the courts are bound to inquire as to whether this new qualification reflects a necessary relation to the standards reasonably required for the proper fulfillment of the tasks to be done.

Again, this Court has stated that neither the state nor any instrumentality thereof can consistently with the intendment of the Fourteenth Amendment pass any law, regulation or order which in its effect, either directly or *indirectly*, deprives any person of rights guaranteed to him by that amendment.

Hill v. Wallace, 259 U. S. 44 (1922);
U. S. v. Butler, 297 U. S. 1 (1935);
Steward Machine Co. v. Davis, 301 U. S. 548 (1939).

The courts have gone even further and have said that in certain instances even the withholding of a privilege for the purpose of accomplishing the surrender or destruction of a constitutional right constitutes a denial of due process.

Frost v. Railroad Commission of California, 271 U. S. 583 (1925);
Kapel v. U. S., 132 F. 2d 902 (C. C. A. 4, 1943);
Hurd v. Hodge, 334 U. S. 24 (1948);
Marsh v. Alabama, 326 U. S. 501 (1946).

And it has been said that for any branch of the government to deprive a person of basic rights without the authority of law violates due process, no matter how indirect the injury may be and no matter what form the governmental action may take.

Screws v. U. S., 325 U. S. 91 (1944).

It follows then that any act of the State or an instrumentality thereof is subject to strict scrutiny to determine (a) whether its effect is to deprive any person, either directly or indirectly, of rights guaranteed by the Fourteenth Amendment; (b) whether it is withholding a privilege for the purpose of accomplishing the surrender or destruction of a constitutional right; or (c) whether in the guise of propriety and regardless of the indirect nature of the injury there is infringement of basic freedoms guaranteed by the Bill of Rights.

III.

The Oath in Question Neither in Scope nor Application Can Reasonably Be Said to Prescribe a Qualification Necessary to the Proper Discharge of the Employment Functions of Those to Whom It Applies.

The ordinance in question is of a dual nature in that it requires both an oath and an affidavit.* It requires an oath that the person did not advocate or was not a member of an organization which advocates the forcible over-

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[1]Section 1. Every person who is hereafter elected or appointed to an office or position in the service of the City of Los Angeles must, before entering upon the duties of his office or position, take and subscribe to the following oath:

I,.....,
do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America and the State of California, and will support and defend the Constitution and laws of the United States of America and of the State of California and the laws of the City of Los Angeles against all enemies, foreign and domestic. I further swear (or affirm) that I do not advise, advocate or teach, and have not within the period beginning five (5) years prior to the effective date of the ordinance requiring the making of this oath or affirmation, advised, advocated or taught, the overthrow by force, violence or other unlawful means, of the Government of the United States of America or of the State of California and that I am not now and have not, within said period, been or become a member of or affiliated with any group, society, association, organization or party which advises, advocates or teaches, or has, within said period, advised, advocated or taught, the overthrow by force, violence or other unlawful means of the Government of the United States of America, or of the State of California. I further swear (or affirm) that I will not, while I am in the service of the City of Los Angeles, advise, advocate or teach, or be or become a member of or affiliated with any group, association, society, organization or party which advises, advocates or teaches, or has within said period, advised, advocated or taught, the overthrow by force, violence or other unlawful means, of the Government of the United States of America or of the State of California, that I will well and faithfully discharge the duties of my office or employment in the service of the City of Los Angeles and that I take this whole obligation freely, without any mental reservation or purpose of evasion, So Help Me God.

throw of Government in the five years preceding the taking of the oath nor that he engages in such activity at the time of taking the oath. It requires an affidavit that he will not engage in such activity while he is an employee of the City of Los Angeles.

The oath and affidavit cover *every employee* of the City regardless of his position or the nature of his duties. We contend that such broad application manifests a complete lack of purpose or intent to reach any specific evil, to fill any particular gap in the present tests applicable to *all public employees.*

Nowhere is it shown that certain employees are in so-called "policy making" positions where it might be said that their views with respect to Government must be known to determine their aptitude and qualifications for such responsibility. Nowhere is it shown that certain employees are in "security" positions where the same test might have relevance, or for that matter any other position of such a nature that it is incumbent upon those charged with the duties of Government to ascertain the employee's attitude toward our institutions of Government in order to properly evaluate their fitness for a particular position.

On the contrary, the oath and affidavit are made applicable to all employees who draw their salary from the public authority, whether they be the Chief of Police, a street cleaner, or sprayer of insecticide on City property. Can it be validly argued that a person's attitude to Government and its forcible overthrow bears a reasonable relation to his fitness for discharging a majority of these

tasks? And yet the law clearly requires that this qualification is supportable only if it does bear such relation.

Again, the oath goes back five years in its search for opinion and activity, apparently in the theory that past action indicates present disposition. But this has never been the presumption in law where proof of present activity results in criminal or economic sanctions under the force of law. This Court has recently affirmed this point in *American Communications Association v. Douds,* 339 U. S. 382, 414 (1949), where it pointed out in sustaining the non-Communist affidavit requirement of the Taft-Hartley Act.

> "Here the intention is to forestall future dangerous acts; *there is no one who may not by a voluntary alteration of the loyalties which impel him to action became eligible to sign the affidavit.*" (Emphasis added.)

Implicit in such a holding is the recognition of the fact that men can and do in the very nature of things change their minds and opinions and as result lose their initial disqualification to participate in the deliberations, actvities or fruits of Democratic Government. Nowhere in this Ordinance is there such a recognition.

IV.

The Ordinance on Its Face Restricts Freedom of Speech and Association.

There can be little argument that this ordinance clearly restricts both freedom of speech and association.

While freedom of speech is not absolute, the limitations have been confined to a narrow area whose limitation finds excellent expression in the opinion of Mr. Justice Douglas in *Terminiello v. Chicago,* 337 U. S. 1 (1949), where he said, at page 4:

> "Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. *That is why freedom of speech, though not absolute,* Chaplinsky v. New Hampshire, *supra* (315 U. S. pp. 571, 572, 86 L. Ed. 1034, 1035, 62 S. Ct. 766), *is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest."* (Emphasis added.)

Nowhere in the brief of the City in opposition to certiorari is it argued that public employment of all or a few of those persons who advocate the forcible overthrow of Government would constitute a clear and present danger or substantive evil.

The same argument holds equally true of the abridgment by this ordinance of freedom association. In this connection, we would like to draw the Court's attention to words written over 150 years ago by the astute historian De-

Tocqueville in his "Democracy in America," Vol. 1, Chap. 12 and Vol. II, Chap. 7, declaring that:

> "When some kinds of association are prohibited and others allowed, it is difficult to distinguish the former from the latter beforehand. *In this state of doubt,* men abstain from them altogether, and a sort of public opinion proves current, which tends to cause any association whatsoever to be regarded as a bold and almost illicit enterprise. . . . When the members of a community are allowed and accustomed to combine for all purposes, they will combine as readily for the lesser as for the more important ones, but if they are only allowed to combine for small affairs, they will be neither inclined nor able to effect it."

This quotation from DeTocqueville is particularly apropos of the oath and ordinance in question, for here the type of proscription, which is both retrospective and prospective in nature, places any individual in the community in jeopardy with respect to the opportunity for, or retention of, public employment, by his association with any organization which is, was or might become in the future an illegal organization within the meaning of the ordinance. In this state of affairs, to paraphrase DeTocqueville, all members of the community at large who may at some time wish to engage in public service or become public employees would abstain from every organization of any character whatsoever for fear that either sometime in the past or presently or sometime in the future such organization would be tainted with the principles prescribed by this ordinance.

Finally, it might be pointed out in connection with this aspect of the problem that it is no answer to the delimitation of civil rights to say that a person who applies for public employment consents to relinquishing certain rights guaranteed to him by the Fourteenth Amendment. True, a person who goes to work for a private employer may be asked to, and in many instances does, give up freedoms which we deem to be essential and natural under our form of government, but this is not true in the field of public employment for the reason that a public employer is an instrumentality of the state, and as an instrumentality of the state he is bound by the restrictions of the Fourteenth Amendment. He cannot either directly or indirectly by any means whatsoever subvert the obligations of the Fourteenth Amendment, which obligations are not binding upon any private employer.

As Mr. Justice Douglas stated it in his dissent in the *Mitchell* case (330 U. S. 75, 124):

> "The difficulty lies in attempting to preserve our democratic way of life by measures which deprive a large segment of the population of all political rights except the right to vote. *Absent coercion, improper use of government position or government funds, or neglect or inefficiency in the performance of duty, federal employees have the same rights as other citizens under the Constitution.*" (Emphasis added.)

V.

The Sanctions Attendant Upon the Enforcement of This Order Subject It to the Constitutional Requirement That It Be Narrowly Drawn to Meet the Specific Evil to Be Remedied.

We would like to direct the Court's attention to the fact that this ordinance by its very nature calls for severe sanctions in its application and so is practically penal in nature. Additionally, it clearly invades civil liberties protected by the Fourteenth Amendment. This Court has consistently held that in either situation the statute, regulation or ordinance must be narrowly drawn to meet and cover a specific problem, and if not so drawn, it must be struck down.

U. S. v. Gaskin, 320 U. S. 527 (1943);
Kordel v. U. S., 335 U. S. 345 (1948);
Murdock v. Penna., 319 U. S. 105 (1942).

Not only is the ordinance in question entirely too broad in its classification of persons covered, but it suffers from an even greater vice in that it proscribes an area which defies any reasonable understanding or awareness of, namely the area of affiliation. The ordinance purports to deny employment, to cancel civil service tenure, and in effect compel the relinquishment of basic freedoms, where in the sole discretion of a public official there has been a determination, not that a person has advocated or belonged to an organization which advocated, but was *affiliated* with such an organization which so advocated. Every present or prospective employee then is faced at his peril with the almost impossible task of determining what constitutes affiliation in the mind of a public official. Where in all of this is there adherence to the rule of "narrowly drawn, clearly defined" legislation which imposes sanctions or transgresses civil rights?

Conclusion.

Our argument has been addressed to the outline of well established legal and constitutional bases for condemning the ordinance in question. However, in the decision of this case, there must be invoked a broader and more fundamental approach to the problems involved. Our times, and indeed the present moment of history, requires consideration anew of those methods whereby free men construct and maintain the institutions under which they can live together. In a context not so pressing, a group of earnest citizens contributed the following:

> "The men who founded our Republic, as those who have built any constitutional democracy, faced the task of reconciling personal liberty and group authority, or of establishing an equilibrium between them. In a democratic state we recognize that the common interests of the people must be managed by laws and procedures established by majority rule. But a democratic majority, left unrestrained, may be as ruthless and tyrannical as were the earlier absolute monarchs. Seeing this clearly, and fearing it greatly, our forefathers built a constitutional system in which valued personal liberties, carefully enumerated in a Bill of Rights, were placed beyond the reach of popular majorities. Thus the people permanently denied the federal government power to interfere with certain personal rights and freedoms."
>
> Report of President's Committee on Civil Rights, U. S. Printing Office, Washington, 1947, at page 5.

There must be considered also that the challenge to our Democratic approach which has gained great support throughout the world was introduced into modern political thinking by the Bolshevik Revolution in Russia. The en-

forcement of political orthodoxy was in our time first made a major tenet of government by the Communist Party of the USSR. It was later used effectively by the Fascists of Italy and reached its ascendency in the Fuhrer-ship concept and the Nazi Dictatorship of Hitler, with its resulting violation of international and national rights, its practice of genocide and its degredation of the individual.[2]

As has been recently and well said by a California Court,[3] the loss of those rights established under our system of constitutional law may come with the slow process of erosion. Indeed, the slighter the invasion the more limited the area, the greater the danger, since before the less sensitive eye the foundation principles may thus more easily and readily be worn away.

The ordinance here before the Court may be said to be symptomatic of the demand for orthodoxy on the part of

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[2]See, The Nature of Our Freedom, and Interpretation of Our Constitutional Heritage (1950), by Leon R. Yankwich, Judge of the U. S. District Court, Southern District of California, page 80 *et seq.*, and citations there given.

[3]In *Tolman, et al. v. Robert M. Underhill* as Secretary and Treasurer of the Regents of the University of California, *et al.* (3 Civ. No. 7946. State of California, Third Appellate District. Decided April 5, 1951; official citation not available), the Court ruled invalid under the California and Federal Constitutions a "test oath," somewhat akin to the ordinance here in question, prescribed by the Regents of the University of California for professors and employees of the University. Pertinent here is the following from its opinion:

> "While this Court is mindful of the fact that the action of the Regents was at the outset undoubtedly motivated by a desire to protect the University from the influences of subversive elements dedicated to the overthrow of our constitutional government and the abolition of our civil liberties, we are also keenly aware that equal to the danger of subversion from without by means of force and violence is the danger of subversion from within by the gradual whittling away and the resulting disintegration of the very pillars of our freedom."

the majority of our people. It is a first, small encroachment upon the residuum of those individual freedoms and rights upon which political and religious liberty are premised. It strikes at the integrity of the individual in a manner not permitted under our Constitution, not required in the necessary performance of Municipal Government, and in a form reminiscent of the test oath and witch-hunt persecutions of the past. As Judge Yankwich put it (*op. cit.* p. 30):

> "The doctrine of limited sovereignty or the limited state maintained by that government *is bound by the law of the land and is not above it.* According to this theory each citizen has certain rights of which he cannot be deprived by the government—either state or federal—or by a majority."

See also his discussion of "Supremacy of the Law," page 108, *et seq.*

The judgment of the State Court sustaining the validity of this ordinance should be reversed.

Respectfully submitted,

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Service of the within and receipt of a copy thereof is hereby admitted this.....day of April, A. D. 1951.

4-13-51—60